IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF TENNESSEE

In re PRO PAGE PARTNERS, LLC, Debtor.	No. 00-22856 Chapter 7
MARY FOIL RUSSELL, Trustee, Plaintiff, vs. CARLETON A. JONES, III, Defendant.	Adv. Pro. No. 03-2042

M E M O R A N D U M

APPEARANCES:

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE

This adversary proceeding is an action by the chapter 7 trustee to enforce rights under an indemnity agreement that was assigned to her. Presently before the court is the trustee's motion for summary judgment and the defendant's motion for judgment on the pleadings that is essentially a motion to dismiss for failure to state a claim. As discussed below, the trustee's motion will be granted and the defendant's motion denied, this court having concluded that the complaint does in fact set forth a claim upon which relief can be granted and that the trustee is entitled to a judgment as a matter of law. This is a core proceeding. *See* 28 U.S.C. § 157 (b) (2) (A).

I.

As set forth in the complaint initiating this proceeding and admitted in the answer, the debtor Pro Page Partners, LLC was a Tennessee limited liability company engaged in the business of marketing and selling paging and cellular communication services to customers in East Tennessee. The defendant Carlton A. Jones, III was a member of Pro Page, holding a 30% membership interest. In connection with a restructuring and sale of the membership units of Pro Page, the defendant entered into a Redemption and Indemnification Agreement dated December 30, 1998 (the "Indemnification Agreement"). The defendant and two individuals named Mark Halvorsen and Joe S. Potter are collectively referred to in the Indemnification Agreement as "Guarantors" while Joseph K. Reid and Lawrence H. Reid are jointly referred to as "Sellers." Under the terms of the Indemnification Agreement, Pro Page and the Guarantors, jointly and severally, agreed to indemnify and hold the Sellers harmless against all claims asserted against Sellers "as a result of the operation of [Pro Page] and/or [Pro Page's] business, including, without limitation, any liability asserted against Sellers arising from personal guaranties to Kenesaw Leasing."

On October 23, 2000, almost two years after the execution of the Indemnification Agreement, Pro Page filed for bankruptcy relief under chapter 11, but subsequently converted the case to chapter 7 on September 4, 2001. Mary Foil Russell was appointed chapter 7 trustee. On April 16, 2003, in the adversary proceeding *Mary Foil Russell, Trustee v. Joseph K. Reid*, No. 02-2027, the trustee obtained a judgment against Joseph K. Reid ("Reid") in the amount of $319,699.05. Thereafter, by an assignment agreement dated June 30, 2003, Reid assigned to the trustee his rights in the Indemnification Agreement. As a result of the assignment, the trustee commenced the instant adversary proceeding against the defendant on August 13, 2003.

It is alleged in the complaint that the trustee as assignee of Reid "is entitled to enforce the Indemnification Agreement against the defendant in the place and stead of Mr. Reid," that the judgment against Reid "arises from the business and operations of Pro Page," and that the defendant "is legally bound by virtue of the Indemnification Agreement to indemnify Joseph K. Reid in full for the Judgment or to pay the amount of the Judgment together with interest earned thereon to the plaintiff." In response to the complaint, the defendant admits in his answer the trustee obtained a judgment against Reid, but denies that "the Judgment arises from the business and operations of Pro Page" or that "the Judgment debt is within the scope of the Redemption and Indemnification Agreement."[1]

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[1]On February 6, 2004, the defendant filed a motion pursuant to 28 U.S.C. § 157(d) requesting that the district court withdraw from the bankruptcy court its reference of this adversary proceeding. The basis of the motion was the defendant's assertion that this is a noncore proceeding and that he had requested a jury trial. In an order entered April 20, 2004, the district court denied the defendant's withdrawal motion, "because this is a core proceeding that arises from the Trustee's administration of the bankruptcy estate, judicial economy will not be served by withdrawing the reference, withdrawal of the reference would cause undue delay and increase the cost to the parties, and withdrawal of the reference will not result in judicial (continued...)

In her motion for summary judgment filed December 15, 2004, the trustee asserts that there is no genuine issue of material fact and she is entitled to judgment as a matter of law, not only to recover from the defendant the amount of the judgment previously obtained by her against Reid but also reasonable attorney's fees and expenses incurred in enforcing the Indemnification Agreement. The defendant opposes the trustee's summary judgment motion for the reasons set forth in his answer. In addition, as set forth in his motion for judgment on the pleadings filed January 28, 2005, the defendant asserts that he had neither notice of the trustee's lawsuit against Reid nor an opportunity to defend against the action; that in the absence of such notice the trustee must allege in the complaint and prove that the judgment against Reid is unavoidable; and because the complaint fails to make this required allegation, it is insufficient on its face, entitling the defendant to judgment on the pleadings. Both parties have submitted affidavits and various exhibits in support of their respective motions and have filed responses in opposition to the other's motion.

II.

Fed. R. Civ. P. 56, as incorporated by Fed. R. Bankr. P. 7056, mandates the entry of summary judgment if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56 (c). "The moving party has the burden of proving

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[1](...continued)
uniformity but will result in forum shopping." (E.D. Tenn. No. 2:04-cv-00045.) On September 24, 2004, this court granted the trustee's motion to strike the defendant's jury demand. The defendant's request for an interlocutory appeal of that September 24, 2004 order was subsequently denied by the district court by order entered January 3, 2005. (E.D. Tenn. No. 2:04-cv-00403).

that no genuine issue of material fact exists and the moving party is entitled to a judgment as a matter of law." *Cox v. Ky. Dept. of Transp*., 53 F.3d 146, 149 (6th Cir. 1995). "If the moving party satisfies its burden, then the burden of going forward shifts to the nonmoving party to produce evidence that results in a conflict of material fact . . . ." *Id.* at 150.

Although the defendant has moved for judgment on the pleadings instead of summary judgment, Fed. R. Civ. P. 12 (c), incorporated by Fed. R. Bankr. P. 7012, provides:

> After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Id. As shown by the trustee's own motion for summary judgment and the various affidavits and exhibits submitted by both parties not only in connection with each party's own motion but also in response to the opposing party's motion, it is clear that each party has had a full opportunity to conduct discovery and present evidence in connection with this court's consideration of the defendant's motion. Accordingly, the defendant's motion will likewise be considered as one for summary judgment. See *F.R.C. Int'l, Inc. v. United States*, 278 F.3d 641, 642 (6th Cir. 2002)(court properly considered motion for judgment on pleadings as motion for summary judgment).

III.

Before addressing the notice issue raised by the defendant, the court will first consider the primary issue in the case: whether the trustee's judgment against Reid falls within the scope of the Indemnification

Agreement. Paragraph 3 of the Indemnification Agreement, entitled "Indemnification," provides in part the following:

> The Company [Pro Page] and Guarantors [Mark Halvorsen, Carleton A. Jones, III, and Joe S. Potter], jointly and severally, agree to defend, indemnify and hold Sellers [Joseph K. Reid and Lawrence H. Reid] harmless from and against any and all liability, claims, demands, damages, obligations or debts asserted against Sellers as a result of the operation of the Company [Pro Page] and/or the Company's [Pro Page's] business, including, without limitation, any liability asserted against Sellers arising from personal guaranties to Kenesaw Leasing.

Thus, under this provision the defendant is required to indemnify the trustee as the assignee of Joseph K. Reid only if the judgment she holds is "a result of the operation of [Pro Page] and/or the [Pro Page's] business . . . ." The factual predicate for the trustee's judgment is described in this court's March 20, 2003 memorandum opinion granting the trustee summary judgment against Reid. As set forth therein:

> On or about January 17, 1997, Pro Page entered into an agreement with Message Express Paging Company, Inc., ("Message Express"), which, *inter alia*, obligated Pro Page to pay Message Express the sum of $310,000 for certain assets (the "Agreement"). Contemporaneously therewith, Mr. Reid executed a personal guaranty (the "Guaranty"), guaranteeing Pro Page's indebtedness and obligation to Message Express under the Agreement.
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> Following the filing of Pro Page's chapter 11 case, Pro Page as debtor in possession commenced an adversary proceeding against Message Express, seeking, *inter alia*, an interpretation of the Agreement and the avoidance and recovery pursuant to 11 U.S.C. § 547, 549 and 550 of certain payments made by Pro Page to Message Express under the Agreement. Subsequent to the conversion of this case to chapter 7, the trustee was substituted as plaintiff in the adversary proceeding against Message Express. Thereafter, the trustee and Message Express agreed to a settlement and compromise of the adversary, which was approved by the court after notice and hearing in an order entered December 19, 2001.
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> The approved settlement provided for the assignment to the trustee of all of Message Express' rights under the Agreement, including all rights of Message Express against Mr. Reid as a guarantor (the Assignment"). As a result of the Assignment, the trustee made demand upon Mr. Reid for the balance owing under the Agreement. When

he refused payment, the trustee instituted the present adversary proceeding.

Finding no genuine issue of material fact and concluding that the trustee was entitled to judgment as a matter of law, this court awarded the trustee a judgment against Reid in the amount of $319,699.05, facts which the defendant herein does not dispute.[2]

In the current adversary proceeding, the defendant Jones argues that the trustee's judgment does not arise out of Pro Page's business or operations but instead out of the trustee's original preferential transfer action against Message Express. His theory is that absent the preference action and Message Express's assignment to the trustee in settlement of the preference action, the trustee could not have enforced Message Express's rights against Reid. In response, the trustee asserts that Reid's judgment debt arose from his guaranty of Pro Page's contractual obligation to Message Express, an obligation that clearly pertains to Pro Page's business or operations.

While the defendant is correct that the trustee could not have obtained the judgment against Reid but for the original preference action, this observation is immaterial. Unquestionably, Pro Page's agreement with Message Express arose "as a result of the operation of [Pro Page] and/or [Pro Page's] business." Pro Page was in the business of providing paging services, and a review of Pro Page's contract with Message Express indicates that it concerned Pro Page's purchase of paging units, computers, Message Express's leasehold rights to paging terminal sites and office equipment at those sites. If Message Express had sued Reid to recover the balance owed it by Pro Page and had Reid then sought indemnity from the defendant herein, there would be no question but that the obligation arose out of the Indemnification

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[2]That judgment was subsequently affirmed by the district court by order entered August 20, 2003. (E.D. Tenn. No. 2:03-cv-00226).

Agreement. The fact that Message Express assigned its interests under the guaranty to the trustee does not change this result, nor does the fact that the trustee obtained the assignment by settling the preference action against Message Express. The Indemnification Agreement imposes an indemnification requirement on types of obligations—those that arise out of Pro Page's business—not on who eventually holds the judgment or how it was obtained. Because Reid's liability under the judgment arose entirely from his guaranty of Pro Page's business obligation to Message Express and Pro Page's failure to perform that obligation, it falls within the scope of the Indemnification Agreement, notwithstanding that the judgment is held by the trustee rather than Message Express.

The defendant also contends that the trustee's judgment against Reid is beyond the scope of the Indemnification Agreement, which as he notes, only references the guaranty to Kenesaw Leasing. He maintains, as established by his personal affidavit, that he did not know of Pro Page's contractual obligation to Message Express or of Reid's guaranty of that obligation, and argues that if the parties had intended to include this particular guaranty, it would have been specifically mentioned.

This argument is similarly without merit because construction of the Indemnification Agreement is governed by the language of the agreement itself regardless of the defendant's knowledge of the Message Express guaranty or his understanding of the parties' intention in executing the agreement.

> When construing contracts, the words contained within the instrument should be given their plain, ordinary meaning, and, "in the absence of fraud or mistake, a contract must be interpreted and enforced as written, even though it contains terms which may be thought harsh or unjust." *Heyer-Jordan & Assoc., Inc. v. Jordan*, 801 S.W.2d 814, 821 (Tenn. Ct. App.1990)(citing *Ballard v. North Am. Life & Cas. Co.*, 667 S.W.2d 79 (Tenn. Ct. App.1983)). If the contract language is unambiguous, the written terms control, not the "unexpressed intention of one of the parties." *Sutton v. First Nat'l Bank of Crossville*, 620 S.W.2d 526, 530 (Tenn. Ct. App.1981). The rights and obligations of parties to a contract are determined by the terms written in the agreement. *Cookeville Gynecology*

& Obstetrics, P.C. v. Southeastern Data Sys., 884 S.W.2d 458, 461-62 (Tenn. Ct. App.1994).

94th Aero Squadron of Memphis, Inc. v. Memphis-Shelby County Airport Authority, No. W2003-00227-COA-R3-CV, 2004 WL 2464451, at *5 (Tenn. Ct. App. 2004). The language of the Indemnification Agreement is unambiguous. It encompasses "all liability, claims, demands, damages, obligations or debts asserted against [Reid and others] as a result of the operation of [Pro Page] and/or [Pro Page's] business, including, without limitation, any liability asserted against [Reid and others] arising from personal guaranties to Kenesaw Leasing . . . ." In light of this court's conclusion that the Reid judgment arose out of Pro Page's business, it falls within the scope of the Indemnification Agreement, even if the defendant was unaware of Pro Page's contract with Message Express or Reid's guaranty thereof.

Furthermore, the absence of any explicit reference in the Indemnification Agreement to a guaranty to Message Express is not determinative since the agreement covers, without exception, "*all* liability, claims," etc. *See Olin Corp. v. Yeargin Inc.*, 146 F.3d 398 (6th Cir. 1998)(holding that indemnification clause covering "all loss, damage, liability, claims, demands, costs, or suits of any nature whatsoever" is of sufficient breadth to encompass environmental liabilities not listed in the agreement). Nor is it material that the indemnity clause specifically listed the Kenesaw Leasing guaranty as one of the obligations covered by the provision since the reference was clearly preceded by the phrase "including, without limitation." *See generally Cintech Indus. Coatings, Inc. v. Bennett Indus., Inc.*, 85 F.3d 1198, 1202-03 (6th Cir. 1996)(The language "including, but not limited to" precludes the application of a limiting construction.). To exclude Reid's guaranty of Pro Page's obligation to Message Express from the indemnity clause would be contrary to the provision's clear and unequivocal language. Accordingly, the interpretation urged by the defendant must be rejected.

IV.

The defendant maintains that even if the judgment against Reid is a result of Pro Page's business or operation and falls within the scope of the Indemnification Agreement, the trustee is not entitled to summary judgment because the trustee did not give the defendant adequate notice of her action against Reid, which failure deprived defendant of the opportunity to participate in or to defend the action. The defendant argues that as a result of this failure, in order for the trustee to recover from the defendant, she must (1) allege in the complaint and (2) prove that the judgment she obtained against Reid could not have been avoided. Because the complaint filed by the trustee does not include this allegation, the defendant argues that the complaint fails to state a claim for relief.

As support for this proposition, the defendant cites the Sixth Circuit Court of Appeals decision in *Ford Motor Co. v. W.F. Holt & Sons, Inc.*, 453 F.2d 116 (6th Cir. 1972). In that case, W.F. Holt as general contractor contracted with Ford to build additions on Ford's glass plant in Nashville. The contract contained an indemnity clause providing that the general contractor would indemnify Ford from liability in the event a worker was injured in connection with the work to be performed under the contract. An employee of a subcontractor injured on the project sued Ford claiming negligence. Ford settled with the employee and then sued the general contractor for indemnity. The district court concluded that the employee had been contributorily negligent which would have barred any liability by Ford, but granted judgment against the general contractor because the court construed the indemnity agreement to cover claims as well as liability. *Id.* at 117-18.

Upon appeal, the Sixth Circuit Court of Appeals reversed, holding that the indemnity agreement only provided for indemnification in the event of "liability" and not merely for "claims." As stated by the

court, "[A] mere claim or demand against an indemnitee when no legal liability exists does not give rise to a right to indemnity under an agreement to indemnify against liability in the sense of accrued liability." *Id.* at 118 (quoting 41 Am. Jur. 2d p. 722, Sec. 31). In reaching this result, the Sixth Circuit also stated: "The general rule is that under a contract of indemnity against liability as distinguished from indemnity against loss or damage, 'the indemnitee must allege and prove that the judgment could not have been avoided, and it is not enough to allege and prove that the injured person obtained judgment against the indemnitee.'" *Id.* It is this language that the defendant herein seizes upon to support his argument that the trustee's complaint is insufficient because it does not make the required allegation.

Again, the defendant's argument must be rejected. As the Sixth Circuit plainly explained , the requirement of alleging and proving that the judgment may not be avoided is applicable to contracts which only indemnify against liability, as opposed to contracts which indemnify against claims, losses, or damages. *See Ford Motor Co.*, 453 F.2d at 118. The Indemnification Agreement in the present case is not limited to liability; it provides indemnity not only for liability, but also "*claims, demands, damages, obligations or debts.*" (Emphasis added.) The clear implication of the *Ford Motor Co*. decision is that the "allege and prove" requirement has no applicability to indemnity provisions such as those in the present case which indemnify against liability *and* claims.

In addition, this court questions the premise underlying the defendant's "allege and prove" argument: that the unavoidability of the judgment must be established because the defendant was not given notice and an opportunity to defend in the adversary proceeding which resulted in the Reid judgment.[3] The

[3]The trustee denies that the defendant did not have notice and an opportunity to participate in the (continued...)

Indemnification Agreement itself did not impose a notice requirement and this court knows of no statutory requirement for notice in these circumstances. "The general rule is that an indemnitee is not required to provide notice, let alone tender a defense, to the indemnitor under an indemnification contract, unless the contract itself requires notification or a tender of defense." *Smithson v. Wolfe*, No. C94-1015, 1999 WL 33656866, *4 (N.D. Iowa 1999)(citing *Fontenot v. Mesa Petroleum Corp.*, 791 F.2d 1207, 1221 (5th Cir. 1986) ("Where the indemnity agreement does not require notice, the courts will not infer a notice requirement as a condition precedent to a right to recover on the indemnity contract."); *Premier Corp. v. Economic Research Analysts*, 578 F.2d 551, 554 (4th Cir. 1978) (relying on "the general rule that notice is unnecessary unless the contract of indemnification requires it")). *See also* Am. Jur. 2d Indemnity § 53 ("Notice to the indemnitor must be given where it is required by the terms of the contract.").

The defendant does cite two older cases that appear to provide support for his notice proposition. *See Jones v. Bozeman*, 321 S.W.2d 832, 839 (Tenn. Ct. App. 1958)(judgment not conclusive where defendants never asked to defend suits or given notice that judgment would be conclusive against them); *Clinchfield R.R. Co. v. U.S. Fidelity and Guar. Co*, 160 F. Supp. 337, 340-42 (E.D. Tenn.

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[3](...continued)
Reid adversary proceeding. To support her assertion that notice was given, the trustee has submitted the affidavit of Thomas C. Jessee ("Jessee"), Reid's attorney in that action. He states therein that during the course of that adversary proceeding, he regularly spoke and corresponded with counsel for the defendant on the status and the ongoing progress of the case. He attaches to his affidavit copies of twelve letters that he mailed to counsel from May 2,2002, when the adversary proceeding was first filed, through April 24, 2003, when he mailed counsel a copy of the judgment. One letter appears to confirm the defendant's agreement to pay for Reid's attorney fees in defending the action. While this affidavit appears to contradict the defendant's affidavit that he did not have the opportunity to participate in the trustee's suit against Reid, it is not necessary to resolve this conflict in light of this court's conclusion that the defendant is bound by the judgment against Reid even if notice was not given.

1958)(quoting *Crawford v. Pope & Talbot, Inc.,* 206 F.2d 784 (3d Cir. 1953))("If the indemnitor was not a party to the original action against the indemnitee, and where he was under no duty to participate in the defense of the original action, or where, being under such a duty, he was not given reasonable notice of the action and requested to defend, neither the indemnitor nor the indemnitee is bound in subsequent litigation between them by findings made in the action."). *Bozeman* involved a right to indemnity under a surety bond, while *Clinchfield Railroad Co.* concerned an indemnity obligation of an insurance company to its insured under an insurance policy. Both of these types of indemnity agreements in all likelihood had a specific notice and opportunity to defend provision in them, unlike the indemnity provision in the instant case. And, a more recent case, construing Tennessee law and citing the *Ford Motor Co*. decision, has held that lack of notice does not bar recovery. *See Sears, Roebuck and Co. v. Strey,* 512 F. Supp. 540, 542 (E.D. Tenn. 1981)("[L]ack of notice to Strey, as indemnitor, of the pending action does not prevent an action by Sears, as indemnitee, for indemnity.").

In the final analysis, this court is unable to conclude, under the particular facts of this case, that absent notice and an opportunity to defend, the trustee must allege and prove that her judgment against Reid is unavoidable in order to recover from the defendant. The Reid judgment arose from Pro Page's contractual obligation to Message Express rather than a tort action where potential exposure is not readily determinable. Both the Message Express contract and Reid's guaranty of that contract were in existence at the time the defendant entered into the Indemnification Agreement. Thus, his possible exposure thereunder was identifiable and calculable when he agreed to indemnify Reid for "all liability, claims, demands, damages, obligations or debts asserted against [Reid] as a result of the operation of [Pro Page] . . . ." The trustee's collection effort in this action is simply an attempt to recover sums for which the

defendant knew or should have known he could potentially be held liable. Furthermore, the judgment which the trustee is now seeking to recover from the defendant has been fully adjudicated as the result of a contested action. Accordingly, the defendant is bound by the trustee's judgment against Reid.

V.

For the foregoing reasons, the trustee is entitled to summary judgment as a matter of law. Her motion will be granted and the defendant's motion will be denied. Further, as permitted by the Indemnification Agreement, the trustee may recover not only the amount of the Reid judgment but also reasonable attorney's fees incurred by her in prosecuting this adversary proceeding. An order will be entered contemporaneously with the filing of this memorandum opinion.

FILED: March 25, 2005

BY THE COURT

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MARCIA PHILLIPS PARSONS
UNITED STATES BANKRUPTCY JUDGE